



**Issue Date: 11 August 2003**

**BALCA Case No.: 2002-IN489**  
ETA Case No.: P1998-CA-09393384/JS

*In the Matter of:*

**4 BROTHERS TIRE SHOP,**  
*Employer,*

*on behalf of*

**MARCELO HERRERA,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearances: David W. Williams, Esquire  
Law Offices of Leonard W. Stitz  
Santa Ana, California  
For Employer

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for labor certification<sup>1</sup> filed by a new and used tire shop for the position of Buyer (Tires). (AF 42-43).<sup>2</sup> The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. ("AF").

---

<sup>1</sup> Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

<sup>2</sup> "AF" is an abbreviation for "Appeal File".

## **STATEMENT OF THE CASE**

On August 12, 1996, Employer, 4 Brothers Tire Shop, filed an application for alien employment certification on behalf of the Alien, Marcelo Herrera, to fill the position of Buyer (Tires). Minimum requirements for the position were listed as two years experience in the job offered. Rate of pay was listed as \$15.26 per hour.<sup>3</sup> (AF 42-43).

Employer received eleven applicant referrals in response to its recruitment efforts, all of whom were rejected as either unqualified and/or unavailable for the position. (AF 87-91).

An Assessment Notice was issued by the California Employment Development Department on September 12, 1997 advising Employer that no record of its business had been found, and instructing Employer to submit specific documentation that a valid business in fact exists. (AF 141-143). In response, Employer submitted further documentation, including its California Tax ID number, a copy of the DE1 (tax registration), tax returns, photographs and various other documents evidencing the business existence. (AF 44-98).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on February 27, 2001, proposing to deny labor certification on several bases, including as pertinent herein, Employer's ability to pay the salary offered and whether in fact Employer has offered a job that is truly open to U.S. workers. (AF 36-41). The CO cited several factors at issue, including the fact that Employer apparently had not registered as an employer in California; that there is no federal employer identification number; that California found no record of any reported wages paid to an employee; that the proprietor has submitted an individual tax return which does not suggest the ability to pay the offered salary; and that the beneficiary of the application is apparently self-

---

<sup>3</sup> The salary was initially listed as \$13.75 per hour, but was amended in response to a prevailing rate of pay issue raised by the local office. (AF 142-143).

employed in the same duties as the labor certification position. The prescribed “Corrective Action” was specific in nature, to include documentation showing evidence of an on-going payroll; such as employer’s nine digit federal employment identification number, Employer’s most recent California quarterly payroll tax return Form 3 DP, including California tax identification number for the Employer; the total amount of wages paid to employees for the quarter and the number of employees; how the person currently performing the duties of a buyer is paid and whether he is the beneficiary of this application; and a copy of the most recent Form W-2 or 1099 for the buyer. Employer was also requested to submit evidence showing income sufficient to pay the offered wage, which could take the form of recent Form(s) W-2 or 1099 reports of income paid by the Employer and/or the Employer’s most recent income tax return for the business.

In Rebuttal, Employer submitted a copy of an e-file tax return for his individual year 2000 income tax return, showing an adjusted gross income of \$12,788 for the year. In addition, Employer submitted copies of licenses and permits issued to Employer along with copies of checks and federal tax deposit coupons Employer identified as Quarterly tax filings. (AF 9-35).

A Final Determination denying labor certification was issued by the CO on September 20, 2001, based upon a finding that Employer had failed to adequately rebut several of the findings cited in the NOF. The CO found Employer’s submission of a tax return evidencing an adjusted gross income of \$12,788 insufficient to establish that Employer has the ability to pay \$15.26 per hour to a full-time employee. Citing Employer’s failure to even acknowledge the majority of documentation requested regarding the job opening issue, the CO further found Employer’s rebuttal submission insufficient to establish the existence of a job truly open to any qualified U.S. worker.<sup>4</sup> (AF 6-8).

---

<sup>4</sup> The CO also denied certification upon a restrictive requirements issue that is not addressed herein as we find the ability to pay/questionable job opening issues adequate to support a denial determination.

Employer filed a Request for Review by letter dated October 19, 2001, and the matter was referred to and docketed in this Office on February 21, 2002. (AF 1-5). Employer filed a Statement of Position on April 2, 2002, asserting that the CO had failed to consider several documents previously submitted which establish an ongoing business and income sufficient to pay the offered wage.

## **DISCUSSION**

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to “protect the American labor market from an influx of both skilled and unskilled foreign labor.” *Cheung v. District Director, INS*, 641 F.2d 666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979). To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), “[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer’s last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.” *Id.* at 8.

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), held that if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. An employer’s failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988). The denial of certification is not appropriate, however, if the CO requests documentation which is

difficult to obtain and the employer submits other evidence sufficient to rebut the CO's challenge. *Engineering Measurement Co.*, 1990-INA-171 (Mar. 29, 1991).

In the instant case, Employer failed to adequately address the issues raised by the CO in the NOF, and accordingly, labor certification was properly denied. In the NOF, the CO was very specific both as to the bases for his findings and the necessary documentation required to rebut those findings. The requested documentation should have been easily obtainable and has a direct bearing on the resolution of this issue. *Gencorp*. On appeal, Employer cites to documents in the record before the NOF was issued as sufficient to rebut the CO's findings. However, as was noted by the CO in his Final Determination, the CO made a reasonable request for further information which the Employer failed to meet. Given Employer's failure to produce the documentation requested, and Employer's failure to submit alternative adequate documentation, we conclude that labor certification was properly denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted

except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.